

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**RALPH J. ORTEGA**  
Claimant

VS.

**CCM COUNTERTOP & CABINET MFG**  
Respondent

AND

**CONTINENTAL WESTERN INS. CO.**  
Insurance Carrier

Docket No. 1,038,580

**ORDER**

Respondent and its insurance carrier (respondent) request review of the April 24, 2008 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

**ISSUES**

The Administrative Law Judge (ALJ) found that the claimant injured his right wrist each and every working day through January 7, 2008. Dr. Gabriel was appointed the authorized treating physician and temporary total disability was ordered paid beginning January 8, 2008 until the claimant is released.

The respondent requests review of this decision alleging that claimant's wrist injury stems from an unrelated September 27, 2007 bicycle accident rather than his alleged series of repetitive injuries while working. Thus, respondent asks the Board to reverse the ALJ's preliminary hearing Order.

Claimant contends that there is no jurisdiction for this appeal. Independent of that, claimant argues that the ALJ's Order is supported by the medical and lay testimony and should be affirmed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member finds the ALJ's preliminary hearing Order should be affirmed.

Claimant was employed as a laborer who manufactured laminated countertops. He originally injured his left ring finger in May 2007. His recovery from that injury was complicated by the fact that a piece of laminate remained in his finger, became infected and required a surgical procedure to remove it. During this period of time claimant continued to work, but due to his left hand limitations, he increased his reliance on his right hand and began to notice pain in his right wrist. He maintains he told his employer of this pain, but this is denied. Indeed, there is some indication in the physical therapy notes, dated July 3, 2007, that the therapist's goal was to reduce the strain to his right wrist. Dr. Gabriel was his treating physician and claimant was eventually released from treatment.

On September 27, 2007, claimant was riding his bike and was struck by a vehicle. Claimant maintains that he injured his shoulder and leg in that accident, not his wrist, and was treated by another physician, Dr. Murati. Claimant told his employer, Thomas Traylor, one of respondent's owners, of his bicycle accident and according to Mr. Traylor, claimant also told him of his right wrist pain. Because of the context of the conversation, Mr. Traylor thought the wrist complaint was as a result of the bicycle accident. Marcia Traylor, a co-owner of respondent, also testified that claimant told her of his right wrist pain on September 27, 2007.

On October 17, 2007, claimant returned to see Dr. Gabriel and voiced right wrist complaints and described his diminished grip strength and overcompensating as a result of his left finger injury. Claimant also disclosed his intervening bicycle accident, but denied injuring the wrist in the accident. Dr. Gabriel reviewed claimant's right wrist x-rays and observed evidence of mild arthritis at the distal radioulnar joint, which coincided with the location of his pain.

Dr. Gabriel indicated that "[i]t is likely that due to his change in mechanics that the right distal radioulnar joint may have been aggravated."<sup>1</sup> He recommended physical therapy, medications including injections, and a long arm splint.

Claimant's left finger claim was never formally docketed and on October 18, 2007 he and respondent entered into a settlement for his left finger claim. The settlement sheet was filed by the Division on October 22, 2007.

Respondent's insurance carrier contacted Dr. Gabriel in January 2008 and posed a number of questions regarding claimant's wrist complaints, his arthritis and their

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<sup>1</sup> P.H. Trans., Ex. 1 at 18 (Dr. Gabriel's October 17, 2007 office note).

connection to his bicycle accident. In response to the adjuster's letter, Dr. Gabriel penned a response that suggested that claimant's wrist symptoms were a function of the aging process but aggravated by his fall.

Based upon these notes, the adjuster terminated benefits. That action prompted claimant to retain an attorney, file an Application for Hearing and set in motion the procedure for a preliminary hearing. Claimant alleged a series of accidents to his right wrist following his left finger injury. Benefits were not forthcoming and the preliminary hearing was held on April 24, 2008. At issue was claimant's request for temporary total disability benefits commencing January 8, 2008 and ongoing medical treatment.

After hearing claimant's testimony as well as reviewing the depositions of Thomas and Marcia Traylor, and reviewing Dr. Gabriel's records, the ALJ granted claimant's request for benefits. This appeal followed.

Claimant suggests the Board has no jurisdiction for this appeal. This Board Member disagrees. K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues: 1) whether the employee suffered an accidental injury; 2) whether the injury arose out of and in the course of the employee's employment; 3) whether notice is given or claim timely made; and 4) whether certain defenses apply. These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.<sup>2</sup>

Here, the issue is whether claimant's uncontroverted need for medical treatment to his right wrist stems from a compensable injury. Put another way, whether claimant's wrist complaints arose out of and in the course of his employment. This is an issue that is specifically jurisdictional under K.S.A. 44-534a.

In order for a claimant to collect workers compensation benefits he must suffer an accidental injury that arose out of and in the course of his employment. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of"

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<sup>2</sup> See K.S.A. 44-551.

employment if it arises out of the nature, conditions, obligations and incidents of the employment.<sup>3</sup>

The ALJ concluded that claimant sustained a series of injuries arising out of his work for respondent. In doing so, he was not persuaded by respondent's argument that the right wrist complaints were solely attributable to the September 27, 2007 intervening accident. It is unclear from this finding whether the ALJ considered Dr. Gabriel's handwritten comments in response to the adjuster's January 17, 2008 letter although it is unlikely that he did. That letter from the adjuster and Dr. Gabriel's response were not contained within the exhibits entered into evidence at the preliminary hearing. And while respondent's counsel tendered them in a letter to the ALJ on April 25, 2008 (one day after the date of the preliminary hearing Order) and asked the ALJ to suspend his decision until "this letter report can be properly admitted into evidence"<sup>4</sup>, there is no indication that the parties stipulated to its admittance. It appears that the Order was written before receipt of respondent's counsel's letter and its enclosure. Thus, that report is not properly before this Court, nor should it have been considered by the ALJ absent some sort of stipulation.

The evidence that was properly before the ALJ and to be considered was the records generated by Dr. Gabriel and includes his uncontroverted conclusion that claimant's overcompensation for his left finger injury gave rise to right wrist complaints, most likely in the form of an aggravation of his preexisting arthritis. This conclusion is supported by claimant's testimony that he compensated for his left hand limitations, he told the physical therapists and even told his employer. Although respondent makes much of the September 27, 2007 bicycle accident, Dr. Gabriel was informed about this accident and claimant denied any right wrist involvement in that accident. Dr. Gabriel did not review Dr. Murati's treatment records from that accident and thus, any conclusions Dr. Gabriel might have made about that accident are, at best, speculative. The ALJ concluded that claimant's right wrist aggravation arose out of and in the course of claimant's continued work activities from May 2007 up until January 7, 2008. This Board Member affirms that decision.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>5</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

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<sup>3</sup> *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

<sup>4</sup> Letter from respondent's counsel to the ALJ and opposing counsel dated April 25, 2008.

<sup>5</sup> K.S.A. 44-534a.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated April 24, 2008, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June 2008.

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JULIE A.N. SAMPLE  
BOARD MEMBER

c: Elaine F. Winter, Attorney for Claimant  
James M. McVay, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge